

DOCKET FILE COPY ORIGINAL
RECEIVED
MAY 15 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
MOBILEMEDIA CORPORATION, et. al.)	WT Docket No. 97-115
)	
Applicant for Authorizations and Licensee)	
of Certain Stations in Various Services)	
)	
To: The Commission)	

COMMENTS OF SECURED LENDERS IN SUPPORT OF
MOTION FOR WAIVER AND APPLICATION FOR REVIEW

The Chase Manhattan Bank, as agent for the secured lenders to MobileMedia Communications, Inc. ("the Secured Lenders"), respectfully files these comments in support of the Motion for Waiver and Application for Review filed by MobileMedia Corporation and its subsidiaries, debtors-in-possession ("MobileMedia"). The Secured Lenders consist of approximately 40 financial institutions that made \$649 million in prepetition secured loans to MobileMedia. Certain of the Secured lenders have also agreed to provide MobileMedia up to an additional \$200 million in postpetition secured financing, which has been approved by an order of the bankruptcy court, in order to protect that substantial financial stake. Secured Lenders thus represent the largest class of innocent creditors of MobileMedia, whose interests *Second Thursday*^{1/} is designed to protect.^{2/}

^{1/} 22 F.C.C.2d 515, *recon. granted*, 25 F.C.C.2d 112 (1970).

^{2/} As noted below, the presiding ALJ concluded that the Secured Lenders had no

No. of Copies rec'd 046 (continued...)
List A B C D E

Background

On April 23, 1997, in accordance with established Commission precedent,^{2/} MobileMedia moved for (1) a temporary stay of the hearing proceedings so that it could pursue a sale or reorganization of the company in the bankruptcy proceedings in accordance with the requirements of *Second Thursday*, and (2) a finding that such relief would be available in this case. MobileMedia's motion made a specific showing of the substantial and irreparable damage to its customers and innocent creditors that would result from the uncertainty and disruption of a hearing. The Bureau supported MobileMedia's motion. So did the Secured Lenders, as well as MobileMedia's unsecured creditors.

The Secured Lenders and the unsecured creditors collectively hold more than \$1 billion in prepetition debt of MobileMedia, and thus are now the principal stakeholders in the enterprise. These creditors expressed serious concern about the potential deterioration of MobileMedia's enterprise value that would result from proceeding through the hearing process. They also demonstrated, and it has been undisputed, that given the enormous size of MobileMedia's operations as the second largest U.S. paging company, effectuating the

^{2/} (...continued)

standing to file comments on this issue, because they had not sought to intervene in the hearing. Petitions to intervene are not due to be filed until June 11. *See* 47 C.F.R. § 1.223(b). Since the Secured Lenders' interests are directly and substantially affected by action on MobileMedia's motion, good cause exists for acceptance of these comments.

^{3/} *See KOZN-FM*, 5 FCC Rcd 2849 (1990); *Oyate, Inc.*, 3 FCC Rcd 3940 (1988). The Commission has adopted a similar policy in the analogous context of distress sales, in order to permit licensees designated for hearing to find qualified buyers. *See, e.g., Atkins Broadcasting*, 8 FCC Rcd 6321, 6322 (MMB 1993); *Allan H. Wiener*, 1986 Lexis 3580 (MMB 1986); *Blue Ribbon Broadcasting, Inc.*, 90 F.C.C.2d 1029, 1030-31 (ALJ 1981).

Commission's *Second Thursday* policy would require substantially more time than in the relatively simple cases that the Commission has faced in the past.

On May 5, 1997, the presiding ALJ issued a Memorandum Opinion and Order denying MobileMedia's motion. The ALJ found "a fundamental difference between privately held and publicly traded corporations which necessarily bar[s the] application to publicly traded licensees" of the *Second Thursday* doctrine. Order at 3. The ALJ concluded that "it has not been shown" that alleged wrongdoers might not profit, either from sale of their stock in the public market at an increased price, or from a future sale or reorganization. *Id.* at 4. Turning *Second Thursday* on its head, he further concluded: "In order to insure that a[n alleged] wrongdoer will not benefit from the transfer, it is necessary to *first* identify all the [alleged] wrongdoers" through a hearing. *Id.* (emphasis added). Although a central purpose of *Second Thursday* is the protection of innocent creditors, the ALJ found that MobileMedia's creditors had "no standing to file Comments." Order at 1 n.1. While noting that "their views have been considered" (*id.*), the ALJ never addressed the undisputed showing made below concerning the potential effect of his order on their substantial interests.

Argument

As MobileMedia demonstrates in its motion, the ALJ's order in this case threatens the ongoing operations of the country's second largest paging competitor, which serves 4.3 million subscribers, and completely ignores the interests of innocent creditors with *over \$1 billion* at risk. It clearly warrants Commission review, and it was clearly wrong.

I. REVIEW OF THE ALJ ORDER IS CLEARLY WARRANTED UNDER THE COMSAT STANDARD.

Under the *Comsat* line of cases, the Commission will waive the requirement of permission to appeal an ALJ's interlocutory ruling where, *inter alia*, the proceeding "involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *Communications Satellite Corp.*, 32 F.C.C. 2d 533, 534 (1971). As MobileMedia demonstrates, this standard mandates interlocutory review here. Indeed, review now is consistent with the special reservation of Commission authority made in the hearing designation order with respect to the basic contours of this proceeding.^{4/}

The ALJ's foreclosure of *Second Thursday* relief involves far reaching public policy questions, as well as vital concerns relating to the public interest in continued competitive paging service. If left standing, the ALJ's unprecedented holding that public companies can never be eligible for a *Second Thursday* solution of bankruptcy proceedings would create a serious obstacle to the future access by wireless competitors to the capital markets, which is vital for the buildout of their systems. Based on the experience of the Secured Lenders, they believe that financial institutions would likely be far more reluctant to lend to such new public company entrants, and indeed to private companies as well if the possibility that a subsequent public

^{4/} For example, the Commission directed that all motions with respect to participation in this case, or proposing changes in the issues to be addressed at hearing, be certified for Commission determination. FCC 97-124, at ¶ 13. The nature of the relief sought by MobileMedia's motion, which would provide for a temporary stay of the hearing to pursue a *Second Thursday* resolution, seeks the same kind of fundamental change in the course of the proceedings.

offering of stock would disqualify their creditors from the protections otherwise available under *Second Thursday*. The ALJ's order also raises the important question of first impression whether a *Second Thursday* stay is available where it is undisputed that going forward with a hearing would cause serious deterioration of the assets of the licensee and therefore of the ultimate recovery by innocent creditors. Finally, the ALJ's order is plainly inconsistent with the public interest. By impairing the ability of the second largest U.S. paging company to take steps necessary to preserve its operations as a going concern, the order risks disruption of service to 4.3 million subscribers and threatens to inject enormous uncertainty into the paging marketplace.

Nor can these serious concerns be addressed at some later time in this proceeding. MobileMedia has made clear, and no party disputes, that absent a stay to pursue *Second Thursday* relief, the conduct of the hearing will result in significant deterioration of its customer and employee relationships -- all to the principal if not exclusive detriment of Secured Lenders and MobileMedia's other innocent creditors. Because the ALJ's decision is an unqualified ruling on the question of whether *Second Thursday* relief is available to MobileMedia, because that important issue is completely separate from the merits to be addressed in the hearing, and because it will be effectively unreviewable on appeal from the ALJ's recommended decision following a hearing, interlocutory review of this collateral order is clearly appropriate. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Jones v. Lilly*, 37 F.3d 964 (3d Cir. 1994); 9 MOORE'S FEDERAL PRACTICE & PROCEDURE § 110.10, at 133.

II. THE ALJ'S DENIAL OF *SECOND THURSDAY* RELIEF SHOULD BE REVERSED.

The ALJ's decision was also plainly wrong.^{5/} The Commission has never suggested that *Second Thursday* relief is unavailable to public companies. Nor does the logic of *Second Thursday* -- which is primarily designed to protect the interests of innocent creditors -- suggest any distinction in protection among creditors based upon the capital structure of the debtor. In creating such a novel *per se* exception to *Second Thursday*, the ALJ also ignored the clear mandate of *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974), that the Commission "constantly be alert to determine whether [its] policies" under *Second Thursday* "might conflict with other federal policies and whether such conflict can be minimized." *Id.* at 1146 n.2.

Here, MobileMedia sought a temporary stay to afford it time to pursue a sale or reorganization consistent with *Second Thursday*. In doing so, MobileMedia was acting "well within the bounds of rationality in terms of faithfulness to [its] duties" under federal bankruptcy policies. *Id.* at 1149. Far from trying to "minimiz[e] . . . conflict" with those policies as required by *LaRose*, the ALJ essentially preempted MobileMedia's effort by prejudging whether any such future transaction could ever possibly satisfy the Commission's *Second Thursday* requirements -- in the face of a substantial and undisputed showing of harm to innocent creditors from continuation of the hearing. Moreover, by holding that a hearing was necessary to ferret out wrongdoers, the ALJ turned that case on its head. As MobileMedia notes, *Second Thursday* deals with *accused* wrongdoers, not *adjudicated* wrongdoers. If "all the wrongdoers" had to be identified before *Second Thursday* could be invoked, a hearing would be required in every case.

^{5/} See *Comsat*, 32 F.C.C.2d at 534.

The ALJ's unprecedented action was based on the speculation that MobileMedia's stock price would be increased by a *Second Thursday* stay, and thus that an alleged wrongdoer who is also a stockholder might be able to "enrich[h] himself from the sale of his stock at an increased price." Order at 4. To the extent that this concern relates to a sale of stock after a *Second Thursday* application is granted, it is premature, because it can ultimately be addressed in the context of the specific transfer application. Moreover, it rests on the highly speculative and unrealistic assumption in this case that existing stockholders will retain any equity under such a plan.^{6/}

The ALJ was also concerned about the possibility of interim sales of stock prior to a reorganization. As MobileMedia has demonstrated, this concern -- which would extend no less to sales of stock in privately held companies -- is not consistent with *Second Thursday*. Once again, however, it is wholly speculative to address any such possibility in the absence of the particular details of a specific *Second Thursday* transaction. Only at that time can the Commission engage in any meaningful analysis of whether alleged wrongdoers would receive "only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." *Second Thursday*, 22 F.C.C.2d at 516. These would include, first and foremost, the interests of innocent creditors holding over \$1 billion in prepetition debt -- interests that the ALJ wholly ignored. It would also include the interests of those holders of 64% of MobileMedia's stock who are unaffiliated with the company. See Emergency Motion at 9. Finally, it would

^{6/} As MobileMedia noted in its request for stay, "The Company believes that any conceivable plan of reorganization of MobileMedia, other than a sale to a third party, would involve a massive conversion of debt to equity, and the substantial dilution, if not total elimination, of equity." Emergency Motion at 9.

involve an analysis of how much (if any) "enrichment" there can possibly be with respect to increases in the value of shares of a bankrupt company, when that value has plummeted from 21 1/4 to only 17/32 over the course of the past year. Order at 4. The Commission made clear that *Second Thursday* transactions can be approved even if they confer some benefits on suspected wrongdoers, so long as the benefits (if any) are outweighed by the equities in favor of innocent creditors and others. See *Seraphim*, 4 FCC Rcd 8819 (1989); *Davis Broadcasting*, 67 F.C.C.2d 872 (1977); *Shell Broadcasting*, 38 F.C.C.2d 929 (1973). That question can only be evaluated in the context of a specific proposal -- not by a peremptory rejection of *Second Thursday* relief before any transaction is even proposed.^{7/} Such a flat ban is wholly inconsistent with the mandate of *LaRose* to minimize conflict with the objective of the pending bankruptcy proceedings to protect innocent creditors.

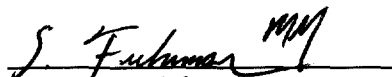
Conclusion

For the foregoing reasons, and those stated in MobileMedia's motion, the Commission should grant a waiver of Section 1.301(b), reverse the ALJ's order denying MobileMedia's Emergency Motion for Special Relief and Stay of Proceedings, issue a finding that a solution consistent with *Second Thursday* is available and may be pursued by MobileMedia, and grant a temporary stay of further proceedings to permit MobileMedia to pursue and finalize such a

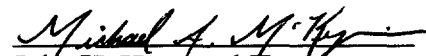
^{7/} Indeed, the Commission has approved special mechanisms, where ultimately shown to be necessary, in order to prevent suspected wrongdoers from realizing substantial benefits in relation to innocent creditors. See, e.g., *KOZN-FM*, 5 FCC Rcd 2849 (1990). That question, too, can be addressed in the context of a specific proposal.

transfer or assignment.

Respectfully submitted,


Steven M. Fuhrman
Kerry H. Mithalal

SIMPSON, THACHER & BARTLETT
425 Lexington Avenue
New York, NY 10017
(212) 455-2000


John H. Harwood II
William R. Richardson, Jr.
Michael A. McKenzie

WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for The Chase Manhattan Bank
Agent for Secured Prepetition and Postpetition Lenders

May 15, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 1997, I caused copies of the foregoing "*Comments of Secured Lenders in Support of Motion for Waiver and Application for Review*" to be hand-delivered to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, DC 20554

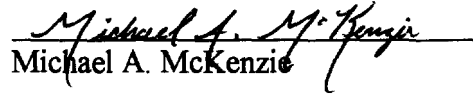
Mr. William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, DC 20554

Daniel B. Pythyon
Acting Chief
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, DC 20554
Rosalind K. Allen
Deputy Chief

Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, DC 20554

Gary P. Schonman
D. Anthony Mastando
Enforcement Division
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 8308
Washington, DC 20554

Dick Wiley
Bob Pettit
Nancy Victory
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006


Michael A. McKenzie